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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,358	04/07/2004	Mark A. Flannery	2004-2156.CIP	8169
23165	7590	11/01/2005	EXAMINER	
ROBERT J JACOBSON PA 650 BRIMHALL STREET SOUTH ST PAUL, MN 551161511			SANTOS, ROBERT G	
			ART UNIT	PAPER NUMBER
			3673	
DATE MAILED: 11/01/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/820,358

Applicant(s)

FLANNERY ET AL.

Examiner

Robert G. Santos

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 4/07/2004, 1/02/2005 & on 10/05/2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-13, 15-18 and 24-28 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-13, 15-18, 24, 25, 27 and 28 is/are rejected.
- 7) ☒ Claim(s) 26 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. _____  |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>04072004, 01022005 &amp; on 10052005</u>                                  | 6) <input type="checkbox"/> Other: _____                                    |

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election with traverse of Figures 21-24, Species 6, in the reply filed on October 5, 2005 is acknowledged.

### ***Claim Objections***

1. Claim 26 is objected to because of the following informalities: In the first line, "15" should be changed to --25--. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1-3, 7, 8, 15-18, 25, 27 and 28 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 5,596,776 to Huang. As concerns claims 1, 7, 15 and 27, Huang '776 shows the claimed limitations of a bed rail comprising a leg portion (82); a rail portion (55-57, 60, 61 & 72) engaged to the leg portion (through element 51) and confronting the first side of a bed, wherein the rail portion includes a frame (55-57, 60 & 61) and a wall (72) engaged to the frame; wherein the leg portion extends from the rail portion toward the second side of the bed; wherein the wall comprises a rigid component; and wherein the rail portion and the leg portion are swingably engaged to each other and

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can be relatively drawn to (as shown in Figure 8) and away from each other (as shown in Figure 7) such that the rail portion is drawable to and away from a position confronting the first side of the bed; furthermore, the examiner respectfully asserts that beds of certain sizes exist such that the bed rail of Huang '776 would inherently meet the limitation wherein the rail portions extends from the leg portion to and beyond the sleeping surface as claimed. With regards to claim 2, the reference discloses a condition wherein the wall (72) comprises first and second rigid components (see Figure 2 and column 2, lines 32-37). As concerns claims 3, 8, 16 & 17 and with further regards to claims 7, 15, 27 & 28, the reference is considered to show a condition wherein the frame includes an upper portion (62 & 63), a lower portion (55), and a pair of side portions (56, 64 & 65), wherein the wall (72) is engaged between the upper and lower portions and between the side portions (through element 57), wherein the rigid component of the wall comprises tubing running to and between the side portions of the frame and being disposed between the upper portion of the frame and the lower portion of the frame in Figure 2; moreover, the examiner respectfully asserts that beds of certain sizes exist such that the bed rail of Huang '776 would inherently meet the limitation wherein the tubing is locked in one of i) a plane of the sleeping surface and ii) relatively closely to a plane of the sleeping surface as claimed.

With regards to claim 18, the reference discloses a condition wherein the tubing (72) comprises a first tube, with the first tube comprising a pair of tube sections, with each of the tube sections engaging one of the side portions of the frame (through element 57), and with the tube sections engagable to and disengagable from each other (see Figures 2 & 9; column 2, lines 32-37; and column 3, lines 45-53). As concerns claim 25,

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the reference is considered to show the use of a first quick connect (57) between the tubing and the side portion of the frame.

4. Claims 1, 4, 6, 27 and 28 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Pat. No. 5,640,726 to Fichner-Rathus. As concerns claims 1, 27 & 28, Fichner-Rathus '726 shows the claimed limitations of a bed rail (10) comprising a leg portion (12); a rail portion (16) engaged to the leg portion and confronting the first side of a bed (as shown in Figures 1 & 2), wherein the rail portion includes a frame (62, 64, 68) and a wall (66) engaged to the frame, with the frame including side portions (64, 68); wherein the rail portion extends from the leg portion to and beyond the sleeping surface (as shown in Figures 1 & 2); wherein the leg portion extends from the rail portion toward the second side of the bed (as shown in Figures 1-5); wherein the wall comprises a rigid component running to and between the side portions of the frame (as described in column 6, lines 65-67 and in column 7, line 1), wherein the sleeping surface is disposed generally in a plane, wherein the rigid component lies in the plane; and wherein the rail portion and the leg portion are swingably engaged to each other can be relatively drawn to (as shown in Figure 4) and away from each other (as shown in Figures 3 & 5) such that the rail portion is drawable to and away from a position confronting the first side of the bed. With regards to claim 4, the reference is considered to show a condition wherein the rail portion *can be* locked at an acute angle relative to the leg portion to minimize any gap between the rail portion and the first side of the bed in column 4, lines 66 & 67 and in column 5, lines 28-30 & 59-67. As concerns claim 6, the reference discloses the use of a counter member (26, 28) engaged to the leg portion.

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5. Claims 1, 2, 27 and 28 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by U.S. Pat. No. 329,663 to McMurray (note especially Figures 1-3 and page 1, lines 40-64).

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 3, 5, 7-13, 15-18 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fichner-Rathus '726 in view of Huang '776. As concerns claims 3, 5, 7, 8, 10, 12, 15-18 and 25, Fichner-Rathus '726 discloses a condition wherein the rail portion (16) may be "[chosen from] many varieties of material ...to accommodate a wide variety of consumer preferences" (see column 6, lines 52-54); however, Fichner-Rathus '726 does not specifically disclose a condition wherein the rail portion includes a wall comprising tubing. Huang '776 provides the basic teaching of a bed rail including a rail portion (55-57, 60, 61 & 72) including a wall (72) formed from tubing. The skilled artisan would have found it obvious at the time the invention was made to replace the wall of the bed rail of Fichner-Rathus '726 with a wall comprising tubing since such a modification would have been generally considered as a substitution of art-recognized equivalents. With regards to claims 9, 11, 13 and with further regards to claims 5, 10 and 12, Fichner-Rathus '726 further teaches a condition wherein the rail portion *can be* locked at an acute angle relative to the leg portion to minimize any gap between the rail

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portion and the first side of the bed in column 4, lines 66 & 67 and in column 5, lines 28-30 & 59-67 and the use of a counter member (26, 28) engaged to the leg portion.

8. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Huang '776 in view of U.S. Pat. No. 4,833,743 to Howell et al., or alternatively, as being unpatentable over Fichner-Rathus '726 in view of Huang '776 and further in view of Howell et al. '743. Huang '776, or alternatively, Fichner-Rathus '726 as modified by Huang '776, do not specifically disclose a condition wherein the wall of the rail portion includes sheeting having a sleeve for the tubing. Howell et al. '743 provide the basic teaching of a bed rail comprising a rail portion including tubing (22) and sheeting (23-25) having a sleeve for the tubing. The skilled artisan would have found it obvious at the time the invention was made to provide the bed rail of Huang '776, or alternatively, the bed rail of Fichner-Rathus '726 as modified by Huang '776, with sheeting having a sleeve for the tubing in order to impart a cushioning surface to the rail portion in the event a user positioned on the sleeping surface contacts the rail portion, thereby helping to ensure enhanced user comfort.

***Allowable Subject Matter***

9. Claim 26 is objected to as noted above and as being dependent upon a rejected base claim, but would be allowable if rewritten to correct the aforementioned informality and in independent form including all of the limitations of the base claim and any intervening claims. The examiner respectfully asserts that one of ordinary skill in the art would not have found it obvious to modify the respective bed rails of Huang '776 and

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Fichner-Rathus '726, as modified by Huang '776, to include an additional quick connect positioned between the tubing and the side portion of the frame such that the tubing is *adjustable in height* as recited in the claim.

### ***Conclusion***

10. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Flannery et al.' 310, Cleary '847, Flannery et al. '846, Gutierrez '981, Baker '280, Scherer et al. '945, Nowak et al. '756, Bernstein et al. '905, Bernstein et al. '067, Luger '014, Dillon et al. '909 and Atkinson '976.

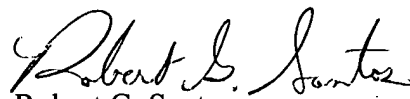
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert G. Santos whose telephone number is (571) 272-7048. The examiner can normally be reached on Tues-Fr and first Mondays, 10:30 a.m. to 8:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Heather C. Shackelford can be reached on (571) 272-7049. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Robert G. Santos  
Primary Examiner  
Art Unit 3673

R.S.  
October 25, 2005